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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WYMAN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 977

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WYMAN

Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court (A. 27-31), dated June 13, 1969, is reported at 302 F. Supp. 478. The ma-

jority and dissenting opinions of the three-judge court (A. 119-137), dated August 18, 1969, are reported at 303 F. Supp. 935. There were no separate findings of fact and conclusions of law.

Jurisdiction

The judgment and order of the District Court were entered on October 1, 1969 (A. 137-138). The notice of appeal was filed on October 24, 1969 (A. 139). The jurisdictional statement was filed on December 20, 1969. This Court noted probable jurisdiction on February 24, 1970.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Constitutional Provisions and Statutes and Regulations Involved

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York Social Services Law, § 134, provides:

> "The public welfare officials responsible under the provisions of section one hundred thirty-two for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that as-

sistance or care may be given only in such amount and as long as necessary. Persons receiving care in an institution shall be visited as often as may be necessary in order that any service or care needed by them shall be provided and in order that institutional care shall be given only as long as it is advantageous for the person's welfare. The circumstances of a person receiving continued care shall be reinvestigated as regularly as the rules of the board or regulations of the department may require."

Title 18 of the New York Code of Rules and Regulations (hereinafter N.Y.C.R.R.) provides in pertinent part:

"Section 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy . . ."

"Section 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports . . ."

Section 175 of the Policies Governing the Administration of Public Assistance provides in pertinent part:

"Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veterans Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

Questions Presented

1. Is the claim that a required home visit by a caseworker to a recipient of Aid to Families with Dependent Children assistance violates the Fourth Amendment prohibition against "unreasonable searches and seizures" to be tested by whether such a visit serves a compelling state interest?

2. Does the requirement that initial and periodic visits be made by caseworkers to the homes of applicants for and recipients of Aid to Families with Dependent Children assistance violate any constitutionally protected right of privacy?

3. Does the denial or termination of assistance, after a hearing, to an AFDC applicant or recipient who refuses to consent to a home visit place an impermissible burden on any Fourth or Fifth Amendment rights of the client?

4. Does the Constitution require a caseworker to secure a search warrant in order to make a home visit to an AFDC client?

5. Did the District Court properly grant plenary declaratory and injunctive relief without requiring resort to a state forum and without hearing any evidence?

Statement of the Case

Appellee claimed below that her continued receipt of Aid to Families with Dependent Children assistance (hereinafter AFDC) could not be made to depend upon her consenting to periodic statutory home visits by local agency caseworkers because such visits, if she does not want them, violate her right to be free from unreasonable searches and seizures and her right of privacy.

a. The Complaint

Appellee receives assistance under the New York AFDC program on behalf of herself and her minor son. According to the complaint, there is no income or source of support for either appellee or her son except this assistance (A. 6).*

On May 8, 1969, a caseworker in the New York City Department of Social Services, wrote to appellee requesting an appointment to make a recertification visit on May 14, 1969. In reply, appellee contacted the caseworker and told her that, although she would be willing to supply any information that was "reasonable and relevant" to her need, any such discussion must take place, not in her home, but, rather, in the offices of the Social Services Department. The complaint alleged that the caseworker explained to appellee that regulations required a home visit and that her refusal to permit such a visit could result in termination of her welfare benefits. Appellee continued to refuse permission for a home visit (A. 8-9).

The only reason given in the complaint for the refusal to consent to another home visit was that, on previous visits to appellee "and, on information and belief [to the homes], of all other persons similarly situated, questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligiblity" (A. 9).

On May 13, 1969, the appellee was notified of the intention of the Department of Social Services to discontinue

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*Appellee first applied and was accepted for assistance shortly before the birth of her son in May, 1967. At that time she was unable to contnue her job and was going on maternity leave. After a home visit, it was felt by the caseworker that the case should be opened although appellee had not satisfactorily explained her ability to manage her rent on the salary she had been receiving (Exh. I, annexed to appellant Wyman's answer [appellee's case history with the New York City Department of Social Services] [hereinafter Exh. 1] Intake Interview, 4/27/67).

assistance because of her refusal to permit a home visit by her caseworker for purposes of recertifying her as eligible for AFDC benefits. On May 27, 1969 a "prior review" hearing was held at which plaintiff and her attorney once more refused to allow a caseworker into the home and termination of benefits was directed on June 2, 1969 (A. 9).

b. Relief Sought

Claiming that her factual allegations established the violation of rights secured to her by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* and §§ 1381 *et seq.* and the regulations promulgated thereunder, appellee brought this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3), (4), 2201, 2202.

The complaint sought the convening of a three-judge court, a temporary restraining order and a preliminary injunction ordering appellees restored to the assistance to which they and the class they represent were entitled and ordering that the policy at issue not be enforced during the litigation. It sought a judgment declaring that the "policies and practices complained of" were unconstitutional; that welfare officials could not "discontinue, or reduce financial assistance, or otherwise interfere with the receipt of such assistance" because of the recipient's refusal to consent to entry without a search warrant; that there could not be a threat to take such action, that no consent could be deemed freely given unless the recipient were told that failure to consent could result in termination, reduction or interference with benefits; and, that there could be no entry or search of any rooms and no touching or examination of any objects except pursuant to a search warrant or on the basis of free consent after a warning that no adverse consequences could result from a refusal to consent (A. 11-12).

The complaint also asked for a permanent injunction restraining entry into homes without search warrants or consent and restraining "[i]nterrogating or questioning an applicant for or recipient of public assistance regarding activities not demonstrably relevant to issues of eligibility" (A. 12).

The order to show cause requested a preliminary and permanent injunction restraining the defendants from entering the home of plaintiff and others similarly situated without either a warrant "issued upon probable cause" or the freely given consent of the recipient after a warning that he need not consent; the convening of a statutory three-judge court; a class action order pursuant to Federal Rules of Civil Procedure, Rules 23(a), (b)(2); and, a temporary restraining order preventing the discontinuance of aid to the named plaintiff because of her refusal to consent to a home visit (A. 19-21).

c. Procedural History of the Case—June 6, 1969-June 26, 1969; The Decision and Order

This action was begun by summons and complaint brought on by order to show cause served on the office of the attorney for appellant on Friday, June 6, 1969. The case was assigned to an attorney on Monday, June 9, 1969. The order to show cause was returnable at 10 a.m. on Tuesday, June 10, 1969. On that date, appellant was given until June 13, 1969 to file a memorandum of law with respect to the need for a three-judge court and a temporary restraining order in behalf of Mrs. James.

On June 13, the memorandum was filed and, on that very day, the District Judge, the Honorable Charles Tenney, issued a written opinion holding that "the recent decisions in *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* [394 U. S. 618]; *King* v. *Smith*, 392 U. S. 309 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *McDonald* v. *United States*, 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 260,

425 P. 2d 223, 57 Cal. Rptr. 623 (1967), necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein" (A. 29).

Disregarding the more limited request of the order to show cause, the court went on to issue a temporary restraining order with respect to "all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes" since denial or termination of aid to them in the event of refusal would cause irreparable injury "both clear and abundant, while the cost to the State and City is obscure and minimal" (A. 29-30). The temporary restraining order contained the warning provision sought by appellee only in the preliminary and permanent injunctions (A. 32-33).

Finally, the single district judge, notwithstanding appellant's argument that such a finding should be made only by the three-judge court, determined that the action "may properly proceed as a class action pursuant to Fed. R. Civ. P. 23" (A. 30).

The three-judge court was designated the following week. In addition to Judge Tenney, the Court consisted of Circuit Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit and District Judge Edward C. McLean of the United States District Court for the Southern District of New York. Appellee was given until June 23, 1969 to file her papers. Appellant was required to reply by June 26, 1969. Oral argument was set for June 30, 1969.

d. The Opinion Below

On August 18, 1969, the Court, Judge McLean dissenting, rendered its written opinion holding the state policy

unconstitutional. The majority opinion, written by Judge Tenney, started from the fundamental proposition that "[t]he overriding function and basic purpose of this Amendment [the Fourth] is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials," and moved on to the assertion that "a search without a warrant or proper consent is presumptively 'unreasonable'" (A. 122). On this analysis, Judge Tenney viewed the issues as being whether required home visits are searches within the meaning of the Fourth Amendment; whether the Fourth Amendment was designed to protect appellee and her class; and, if both questions were answered in the affirmative, whether the State of New York could condition AFDC benefits on a "waiver of rights embodied in the Fourth Amendment" (A. 123).

After characterizing as "frivolous" (A. 123) any contention that home visits were not searches within the meaning of the Fourth Amendment and pointing out that "[t]he guarantee of protection against unreasonable searches extends to the innocent and guilty alike" (A. 124) and is not limited to a protection against the search for evidence of crime, the majority stated that:

> "[G]overnmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity . . . To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely 'social problem'." (A. 126)

The majority thus reached the conclusion that appellee was entitled to "the guarantees of the Fourth Amendment" and added that the characterization of AFDC grants as a privilege did not mean that such grants could be conditioned on the relinquishment of a constitutional right (A. 126).

The reality of the problems inherent in its position was briefly noted and quickly disregarded by the majority opinion:

> "While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor." (A. 127)

Relying exclusively on a series of First Amendment cases, Judge Tenney stated that it was not sufficient to show "a rational relationship to some valid governmental policy" nor to show "merely that the public interest justifies the type of search in question" (A. 127).

It was the majority opinion that there could be no general exception to the constitutional warrant requirement where the public interest could be preserved and "[p]ermissive [*sic*] legislative goals" achieved by means "more narrowly" designed (A. 127-128). The majority went on to propose a series of "[L]ess drastic means for achieving the same basic purposes for which the City and State

urge home visits are designed" (A. 128). The Court, thus, viewed a duly-executed lease as proof of actual residence, birth certificates as proof of family composition, the availability of medical facilities as adequate to ascertain the well-being of the child, and the availability of information about goods and services in the offices of the Department "should the recipient wish to make her needs known there" as adequate to determine those needs. Finally, the Court found that "[t]he regularity of school attendance, academic achievement and information gathered from the interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home" (A. 128). Maurice James, the child of appellee, was, at the time, two years old.

In the opinion of the majority, if "any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case", an application may be made for a search warrant based on probable cause within the meaning of *Camara* v. *Municipal Court*, 387 U. S. 530, and "a suitably restricted search warrant" could issue (A. 128-129).

The majority was also of the view that the home visit could be construed as designed to obtain evidence of criminal activity since New York Social Welfare Law, § 145 requires welfare officials to provide any information it obtains of such activity to prosecuting authorities and since, in 1933, the County Court of Westchester County purportedly gave the law a broad interpretation. *People* v. *LaFace*, 148 Misc. 238, 266 N.Y.S. 458. Because "home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity . . . they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given" (A. 130).

Finally, the Court acknowledged that, "[T]here exists a pressing State interest in preventing such anti-social

behavior as child abuse or neglect"; it recognized "the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved" and it "hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their 'clients'." It concluded, however, that "[t]he laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure" (A. 132).

Judge McLean dissented, stating first:

> "We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law." (A. 136)

Dealing next with the new warrant requirement, Judge McLean pointed out that the majority had left unclear the showing necessary to obtain a warrant but that, if the showing required was probable cause that the law had been violated, "the fundamental purpose of the program is ignored" and if a warrant could be obtained "merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality" (A. 136). Judge McLean said that reading records, if they were available, "cannot be an adequate substitute for first-hand observations of living conditions in the home" (A. 136). He thought that the only result of a warrant procedure would be "to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship

which can be effective only when it is based upon mutual confidence and trust" (A. 136).

Judge McLean viewed the *Camara* and *See* cases as distinguishable on their facts and concluded that the majority's extension of those cases to the instant case was "striking a damaging blow to the successful administration of this important social welfare program" (A. 137).

Despite the short time which the parties had had to prepare the case, despite the offer to produce additional material made by appellant at oral argument, despite the fact that appellant's memorandum of law was limited only to the question of a preliminary injunction and despite the fact that issue had been joined by the answers to the complaint, the District Court granted declaratory relief and a permanent injunction (A. 137-138).

Summary of Argument

Although a home visit by a caseworker to a recipient of AFDC assistance is subject only to reasonableness standard stated by the Fourth Amendment, the home visit, in fact, serves a host of compelling State interests. It serves to verify that all of the criteria of eligibility for assistance are met and to insure that funds are allocated only to eligible people and in the amounts necessary. It serves to insure that the welfare of the child is being safeguarded. As such, it applies to applicants for assistance, recipients of assistance and may be necessary to verify a request for a special grant.

Indeed, the home visit is a validation tool required by the federal government under the present AFDC program for a selected sample of cases. It is part of the full field review being used to test the new Simplified Eligibility System in selected projects around the country. It was one of the procedures used in the recent study of the AFDC program in New York City.

The State has scrupulously guarded against any abuse in the home visit by provisions that it be made periodically, that it be made at specified times of day and that it not be extended to any closed areas.

There are yet no viable alternatives to the home visit despite the finding of the District Court to the contrary.

Termination of assistance by virtue of a refusal to permit a home visit is not an impermissible burden on the right of privacy since such a visit is reasonable in the first place. In this respect, the Fourth Amendment right of privacy differs from the Fifth Amendment privilege against self-incriminaton because, unlike the right of privacy, the latter privilege may not be abridged, it may only be replaced by a co-extensive immunity. By contrast, the Fourth Amendment does not prohibit searches and seizures but only "unreasonable searches and seizures."

The remote possibility of criminal prosecution in the case of a home visit should not serve to bring this case within the aegis of the criminal law and to limit the State's methods for insuring a fair distribution of available funds to the harsh sanction of a criminal prosecution. It is not the purpose of the home visit to look for evidence of criminal activity and the speculative possibility that such material could be discovered may be satisfied, if necessary, by a simple exclusionary rule. Appellee may not assert a right to withhold information on the basis of such a possibility where she herself acknowledges the undeniable fact that she had a duty to provide information with respect to her eligibility.

Nor is a search warrant required to make a home visit. The insistence by the District Court that such warrants be obtained would produce the anomalous result that the agency to whom the applicant has applied for assistance must obtain a warrant to verify eligibility for future payments of public funds. Thus, the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530 is inapplicable. Furthermore, the case involved a search for violations and

was directed to a specific factor which can readily be isolated in a warrant. A warrant is not necessary to inform the applicant or recipient of the purpose of the home visit here, its scope or the authority of the person making the visit. Indeed, it would be inimical to the successful administration of the AFDC program which depends on a one-to-one relationship between caseworker and client. In addition, no standards are established by the District Court governing the requirements for the issuance of such a "warrant."

Finally, the case was not in a proper posture to be finally adjudicated by the District Court. The Court did not require appellee to present her complaints to the appropriate State forum even though she had initiated available state procedures which she abandoned mid-stream for the District Court.

At the very least, a trial should have been held as to whether or not the alternatives which the District Court on its position found a substitute for a home visit were actually practicable and adequate.

POINT I

A required home visit, by appointment, to an applicant or recipient of AFDC assistance is not an unreasonable intrusion on any constitutionally protected right of privacy.

Appellee, a recipient of AFDC benefits in New York, began this action after she refused to permit, by appointment a week in advance, a periodic visit to her home by a local Social Services caseworker in order to establish her eligibilty for continued assistance. As a result of this refusal, assistance to her was terminated after a hearing.*

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* The hearing was held by the New York City Department of Social Services (A. 16-18). Appellee abandoned her right to a State hearing and commenced the instant action.

Appellee claimed below that a required home visit unconstitutionally forces her to sacrifice her right of privacy. Her stated objection to permitting a home visit, even one made by appointment, was that during such visits questions are asked which she feels are not relevant to her eligibility or which are too personal in nature. She did not claim that the visit represents a search or inspection of her premises in any commonly understood sense. She simply does not wish to conduct an interview in her home. Paradoxically, she stated her willingness to provide all relevant information outside her home. No explanation was offered as to why questions asked outside the home are less objectionable than questions asked inside the home and no example was given of any objectionable question.

The District Court, in concluding that no home visit could be made over objection except under the authority of a "suitably restricted" search warrant (A. 129), completely ignored this sole stated basis for the complaint. Nor did the Court rely either on the full panoply of constitutional amendments suggested by appellee (*supra*, p. 6), or on the "penumbral right of privacy and repose" suggested in the opinion convening the three-judge court (A. 29). The Court relied only on the Fourth Amendment (and, by implication, on the Fifth) as made applicable to the States by the Fourteenth Amendment.

A. A claimed violation of the Fourth Amendment is to be judged by whether or not the challenged action is reasonable within the meaning of that Amendment.

The standard employed by the District Court in assessing appellee's Fourth Amendment claim flies in the face of the language of the Amendment itself. Essentially, the Court held that the home visit without a warrant is an invasion of privacy which the State must show it has a "compelling interest" in making. However, the Fourth Amendment is one of the provisions of the Bill of Rights

with its own standard for judging whether or not it has been violated:

> "The right of the people to be secure in their persons houses, papers and effects, against *unreasonable* searches and seizures, shall not be violated. . . ." U. S. Const. amend. IV (Emphasis supplied).

It is only unreasonable searches which the Constitution forbids. *Desist* v. *United States,* 394 U. S. 244, 254 n. 23, *Terry* v. *Ohio,* 392 U. S. 1, 9. Concomitantly, a search which is not unreasonable does not violate the Fourth Amendment and no further interest in making it, compelling or otherwise, must be shown.

The Fourth Amendment immunity from search and seizure is not "a virtually unconditional personal right" which can be infringed only on a showing of compelling need. *Shapiro* v. *Thompson,* 394 U. S. 618, 643-44 (concurring opinion of Mr. Justice STEWART). It is a right which, by definition, must bow to reasonableness. By contrast, for example, First Amendment rights are "virtually unconditional" as written and so can be overcome only by a compelling State need. The Fifth Amendment privilege against self-incrimination may not be overcome by any showing. It may only be replaced by an immunity coextensive with the privilege. Whereas a compelling state interest inquiry implies a finding that a virtually unconditional right has been abridged, in Fourth Amendment cases such an inquiry is self-contradictory. The inquiry is not whether a State has a compelling interest in making unreasonable searches. The inquiry is solely whether the search it made was reasonable. If it was, no right has been violated.

Any suggestion that a "penumbral right of privacy and repose" elevates the standard by which the home visit is to be judged is untenable. While several amendments

directly protect or have auras of privacy which surround the explicit right which is the subject of the provision (e.g., First Amendment right of free association; Third Amendment quartering of troops in peacetime; Fifth Amendment privilege against self-incrimination), any claimed violation of privacy must be related to a specific "command of the United States Constitution." *Katz* v. *United States*, 389 U. S. 347, 350.* The peripheral right of privacy is, thus, to be measured by the same standard as the provision from which it derives.

The Fourth Amendment right of privacy is not denigrated because of the standard by which it is measured. The standard simply reflects the reality that, in a society, the individual may not wholly insulate himself. "Virtually every governmental action interferes with personal privacy to some degree." *Katz* v. *United States, supra* at 350. But governmental action cannot always be invalidated. Thus, unless an absolute right is involved, we must look to see whether the action is reasonable. See *Dandridge* v. *Williams*, —— U. S. ——, 38 U.S.L. Week 4277, 4281 (April 6, 1970).

The significance of this principle for the instant case lies not so much in whether or not the home visit can withstand a "compelling interest" test, which it can, but lies, rather, in the fact that, once an appropriate analysis is employed, the inappositeness of the District Court's "less drastic means" test (*infra*, pp. 29-31) and the inaccuracy of its "unconstitutional burden" holding (*infra*, pp. 32-33) become manifest. Moreover, the confusion generated by the sudden change in standard wrought by the Court below makes the issue significant even apart from this case.

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* The only exception to this principle is found in *Griswold* v. *Connecticut*, 381 U. S. 479. The right of privacy in that case is in no sense analogous to the right asserted here, and is, essentially, a fundamental human right.

B. A required periodic home visit by a caseworker to an AFDC recipient is reasonable within the meaning of the Fourth Amendment.

Any proper assessment of a Fourth Amendment claim must take account of "the reasonableness in all the circumstances of the particular governmental invasion . . ." *Terry* v. *Ohio, supra* at 19. The "specific content and incidents" of the right of personal security protected by the Fourth Amendment "must be shaped by the context in which it is asserted" (*Id.* at 9). For appellee, only one element shapes the context of this case—the fact that an interview with respect to her eligibility for AFDC assistance is to be conducted in her home. No other circumstance is accorded relevance. No weight is assigned to the circumstances which make such an interview necessary or to the conditions under which it is made. However, neither the purpose nor the conditions of such interviews can be disregarded. The home visit must be viewed in light of the purposes of the AFDC program in general, the broad and close relationship between agency and client, the relationship of the home visit to the objectives of the program and the protections under which the visit is made.

The required home visit is an aid in determining eligibility for AFDC assistance. It is a means of assuring that funds are allocated only to persons who are eligible for them, that they are allocated to the extent to which they are necessary and that they are used for the purpose for which they are allocated—the welfare of the dependent child in his home. 42 U.S.C. § 605.

The entire focus of the AFDC program is the child in the home. *Dandridge* v. *Williams, supra* at 4279. It was the judgment of both Congress and the New York State Legislature that children of parents with inadequate resources for their upbringing are, nevertheless, best cared for in their own homes rather than in institutions where at all possible. To effectuate this end both the children

and their parents or guardians require assistance. 42 U.S.C. § 601. However, the program is thwarted if the money is not needed or is not being used for the benefit of the children.

Accordingly, the law presently requires investigation of the factors of eligibility of AFDC applicants and recipients. Appellee has never disputed the reasonableness of some investigation. Nor could she. *Cf. Shapiro* v. *Thompson, supra* at 636. See also, *Hannah* v. *Larche*, 363 U. S. 420, 448-49. She has never directly asserted that her home is not relevant to such an inquiry. However, her opposition to a home visit must mean either that she considers her home irrelevant or that the agency in charge of administering funds must accept her version of the relevant factors in her home. Neither of these propositions is accurate.

The relevance of the home to the proper administration of the AFDC program is amply expressed in the applicable statutes and regulations. 42 U.S.C. § 602(d)(14) requires that a state plan must provide programs geared to:

> "the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative and individual to attain or retain capability for self-support and care and to foster child development."

Cf. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 3452(10), dealing with foster care, which requires the assessment of "total parental functioning and home conditions upon the child."

New York State has adopted the federal policy. See N. Y. Social Services Law, §§ 348-350; 353-354. 18 N.Y.C.R.R. § 369.2(c) provides:

> "(c) *Welfare of child or minor.* A child or minor shall be considered to be eligible for ADC if his home situation is one in which his physical, mental and

moral well-being will be safeguarded and his religious faith preserved and protected. (1) In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation. Where appropriate, consultation or direct service shall be requested from child welfare."

The continuing interest in the well-being of the child requires that:

"The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility. . . ." 18 N.Y.C.R.R. § 369.4(b)(1).

Where the law makes it perfectly clear that the home situation is the critical factor; it is completely unrealistic to hold that the home may not be visited by appropriate personnel or that there are adequate alternatives to such a visit.

The services aspect of the home visit has been described as follows:

"An agency may provide recipients with a list of services available, but the recipient may not be aware or willing to acknowledge his need of a particular service, or for some reason may not request it. On the other hand, an alert and interested worker in a home visit may identify needs for which the agency may offer help, e.g. need for more adequate furnishings . . . or for repair of or removal from unsafe

> conditions . . . Help can be offered to improve housekeeping or child care though service might never be requested." (A. 70, Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York.)

Child protective services are not optional with the parent where the welfare of the child may be jeopardized. The AFDC child is peculiarly susceptible to the hazards of life, to neglect and even abuse, not necessarily for want of love, but for want of means. He is, by definition, a one-parent child and may be one of several children in the family (See A. 33-56). The amount allocated for his care admits of no leeway in expenditure; the available housing is scarcely first-rate; there is no money available for baby sitters. These are built-in factors for the creation of serious physical and emotional problems. Thus, the recently much discussed problems of child neglect and abuse are inherently more prevalent in assistance households, a fact recognized by federal authorities. *Advisory Council Report, U. S. Dept. of Health, Education and Welfare; Welfare Administration, Bureau of Family Services,* April, 1963.

It is essential, therefore, that a continuing evaluation be made so that "the amount, nature and manner of providing assistance be determined with due regard to the conditions existing in each case." (Affidavit of Eleanor Walsh, *supra,* A. 69). It would, in this case, for example, be absolutely essential to verify appellee's statement that there were rats in her apartment (Exh. 1, 10/9/67), particularly where appellee indicated that she had done nothing about the alleged problem. It would also be essential to see a child who, in the first year of his life, was in the hospital two times (Exh. 1, 7/20/67) including once with a skull fracture and who was treated for, among other things, a "dent and bump on his forehead" (Exh. 1,

2/19/68, 4/19/68). The worker, who would also be concerned about the child's relationship with his mother (Exh. 1, 7/26/67), observing the child in his home, was able to report him "healthy" (Exh. 1, 5/7/68, 12/26/68).

The home visit also serves to verify more objective eligibility criteria. See 18 N.Y.C.R.R. § 351.2. It verifies actual residence at the address provided, family composition and need and its extent. Even those factors are "variables" (18 N.Y.C.R.R. § 351.23), which it is reasonable periodically to redetermine. Indeed, appellee has never satisfactorily established her initial eligibility for assistance (Exh. 1, 5/2/67, 6/28/68) and she has a serious money management problem (Exh. 1, 12/20/68).

The extent of need has become still more difficult to verify if the State of New York is returned to a system of providing special grants for individual items or if a family budget must be calculated on an itemized basis. See *Rosado* v. *Wyman*, —— U. S. ——, 38 U.S.L. Week 4266 (April 6, 1970). Visual verification of need for a requested item may be the only sure way to avoid misallocation. The record in this case is rife with such potential examples. Thus, appellee requested a new crib mattress, the need for which could not be verified (Exh. 1, 8/14/67), a new bed, which she did not need (Exh. 1, 3/7/68, 5/15/68), new furniture, which she did not need (Exh. 1, 5/1/68, 5/7/68), and linoleum, the need for which was verified (Exh. 1, 8/14/67).

The federal government requires verification of eligibility in a selected sample of cases. This Quality Control procedure is to include home visits. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part II, § 6200 (a) (3). The State of New York has promulgated regulations pursuant to N. Y. Social Services Law, § 134, requiring that initial eligibility must be determined by a home visit (18 N.Y.C.R.R. § 351.10) and that the required recertifica-

tion every three months must be determined by an interview or a home visit (18 N.Y.C.R.R. § 351.21).*

C. A system of accepting a client's declared need for assistance does not undermine the necessity for home visits.

Appellee's implied position that her own declaration of need is sufficient to establish eligibility for AFDC assistance for herself and her child is presently the subject of a nationwide experiment. Ironically, this program does not support her position. SRS Program Regulation 10-3 (45 CFR Ch. 2, § 205.20) requires the States to establish a program in selected areas for a "Simplified Method for Determination of Eligibility":

> "The simplified method means an organized method by which the agency accepts the statements of the applicant for, or recipient of assistance, about facts that are within his knowledge and competence (all facts except those specified in paragraph (a)(3) of this section as a basis for decisions regarding his eli-

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* Many States require home visits for initial and some for continuing eligibility for AFDC benefits. See *e.g.*, Ark. Stat. 83-131 (1968); Ala., Manual for Administration of Public Assistance, Part I-8 (B) (1968 rev.); Ariz., Regulations promulgated pursuant to Revised Statute § 46-203, Reg. 3-203.6 (1968); Cal. State Dept. of Social Welfare Handbook, C-012.50 (1964); Colo. ch. 119, Art. 9, C.R.S. 1963 (1967 Supp.), as amended ch. 279 Session Laws, 1969; Fla. Public Assistance ch. 100; Ga. Division of Social Administration—Public Assistance Manual, Part III, Sec. V (D)(2), Part VIII (A)(1)(b) (1969); Ill. Stat. Public Aid Code 23 §§ 4-7; Ind. Stat. 52-1247, Dept. Pub. Welfare, Rules and Regs., Reg. 2-403 (1965); Mich. Public Assistance Manual, Item 243 (3)(F) (Rev.) 1967); Miss. Code 1942 § 7177 (Laws of 1940 ch. 294); Mo. Public Assistance Manual, Dept. of Welfare, Sec. III (1969); Nebraska, State Plan and Manual Regulations, Part IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, Part II, §§ 2120, 2122 (1969); N. M. Public Welfare Act, 13-1-13, Health and Social Services Department Manual, §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV(D)(2); S. Dak. L. 1967, 28-7-7 (formerly SDC 1960 Supp. 55.3805); Tenn. Code Ann. 14-301 *et seq.* 37-309, Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wisc. Public Assistance Law Sec. 49.19(2).

gibility and extent of entitlement." 45 CFR § 205.20 (c)(1).

45 CFR § 205.20(a)(3) provides that:

> "When under the simplified method, statements of the applicant or recipient are incomplete, unclear, or inconsistent, or where other circumstances in the particular care indicate to a prudent person that further inquiry should be made, and the individual cannot clarify the situation, the State agency will be required to obtain additional substantiation or verification."

Should the experiment prove feasible, it will be implemented on a nationwide basis. At present, reports from the experimental projects must be presented to the Secretary of Health, Education and Welfare by July 1, 1970 and his decision with respect to such implementation will be forthcoming at some time after that.

In neither its experimental nor its ultimate form is the simplified eligibility method to go untested. The regulation provides for:

> "Validation which relates to the procedures adopted in the initial testing of the correctness of the eligibility decisions. The validation process consists of a full field review of samples of local agency case actions made under the simplified method, to determine how reliable the entire method is in actual operation."

The full field investigation:

> "is required for all cases included in the sample. *The investigation will include a home visit with the client* (and members of the client group, insofar as necessary) regardless of whether the local agency itself conducted a field investigation. Appointments for the home visit may be made." THE SIMPLIFIED METHOD FOR DETERMINATION OF ELIGIBILITY, SRS PROGRAM REGULATION 10-3, IMPLEMENTATION GUIDES FOR

STATE AGENCIES, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, ASSISTANCE ADMINISTRATON (March 10, 1969) (Hereinafter IMPLEMENTATION GUIDES) p. 48 (Emphasis supplied).

Moreover, "[t]he agency, in carrying out the 'full field review' required of it to validate the Simplified Method, must document or otherwise substantiate *all* factors of eligibility on a selected sample of cases (Emphasis in original). At the time he completes and signed the simplified form the applicant or recipient, therefore, *must agree to this full field investigation in the event his or her case is selected for review*" (Emphasis supplied). IMPLEMENTATION GUIDES, Draft Guide No. 1 (Addendum) (b) (June 19, 1969), p. 2.

The Quality Control System for validating eligibility should the experimental system become permanent has not yet been devised. IMPLEMENTATION GUIDES, *supra*, p. 36. There is, however, no reason to believe that it will not include home visits to a selected sample of cases.

In short, whatever program for eligibility exists, it must be validated. The home visit is one of the time-tested methods for accomplishing that validation. It is used under the present federal Quality Control System. It is used in validating the experimental simplified eligibility system. Significantly, it was used in the recent study of the New York City AFDC program by state and federal authorities. See COMMITTEE ON WAYS AND MEANS, U. S. HOUSE OF REPRESENTATIVES, *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), p. 5 (Hereinafter *Report of Findings of Special Review*).

It is of no constitutional significance that these programs use the home visit in a sample of cases while New York presently uses it for all cases. The question is whether the home visit may be conducted at all. If it is

permissible, then its scope is one for legislative determination. Moreover, even in sample cases, the home visit cannot be at the discretion of the applicant or recipient. Such an option would effectively destroy the validity of the findings of the accuracy of eligibility determinations. See IMPLEMENTATION GUIDES, Draft Guide No. 1 (Addendum) (b), *supra.*

One additional factor should be noted. As a part of the simplified program for determining eligibility, New York is also experimenting with a complete separation of the income maintenance and social services aspects of the AFDC program. See *Implementation Guides, supra,* p. 99; STATE OF NEW YORK, DEPARTMENT OF SOCIAL SERVICES, *The New Experimental Systems Design for Delivering Income Maintenance and Social Services* (May, 1969). This aspect of the program involves a separation of staff functions, designed, *inter alia,* to free caseworkers for more intensive social services work. This would include home visits for service purposes. While many services would be optional, protective services for the child would not (*Id.* p. 3).

It cannot be known with any certainty the extent to which the home visit acts as a deterrent to abuse, the extent to which an AFDC client can assess his own needs in terms of available resources or the impact various aspects of the new experimental programs will have on the ultimate design of those programs. However, any new constitutional rule dealing with home visits may well prove premature.

D. The home visit is made with the utmost concern for the dignity of the applicant or recipient.

Not only is the home visit directly interwoven with important, indeed, compelling, governmental objectives, but scrupulous care is taken to see that it is not abused. Federal, State and local regulations mandate that "[t]he policies and procedures for taking applications and determining eligibility for assistance or other services . . .

will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights." HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2200 (a) (H. T. No. 139, Feb. 8, 1968); 18 N.Y.C.R.R. § 351.7. See also Informational No. 67-41 New York City Department of Social Services, July 3, 1967 (Record on Appeal, Document No. 15, Appendix "B").

This directive has several aspects. It means first, that the applicant or recipient is the "primary source" of information about his eligibility. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2220 (e) (1); 18 N.Y.C.R.R. § 351.6. Obviously a client's home is a part of that. It means, next, that "collateral contacts" shall not be made without the consent or knowledge of the applicant or recipient. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2300 (e) (2); 18 N.Y.C.R.R. § 351.7. Collateral contacts include seeking information from "social agencies, doctors, hospitals, and similar resources, or . . . relatives or other individuals" (*Id.*). They also include schools. 18 N.Y.C.R.R. § 351.6.

Finally, this policy protects a client from an agency worker:

> "entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers or papers, to seek clues to possible deception." HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2300 (a); N. Y. City Informational No. 91b, *supra;* See 18 N.Y.C.R.R. § 351.1 (d).

The home visit is, thus, circumscribed to strike a balance between the legitimate interests of the agency and

the right of privacy of the individual. Significantly, appellee, here, does not maintain that any one of these restrictions on the home visit was violated at any visit to her home. She does not express any fear that such violations will occur in the future. Moreover, the visit which she did refuse was sought to be made by appointment a week in advance. Thus, the only sacrifice of her privacy which she was required to make was the admission of the caseworker which, as we have said, is closely related to determining her eligibility. Clearly, that visit, then, is wholly reasonable. Contrast *Parrish* v. *Civil Service Commissioner of the County of Alameda*, 66 Cal. 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967) (midnight raids to determine fraud by violation of the "man in the house" rule).

E. No alternative method is a complete substitute for the home visit.

Despite the relationship of the home visit to the determination of the factors of eligibility, the District Court found the visit unreasonable because its objectives can be met by "[l]ess drastic means" (A. 128).

In the first place, this "less restrictive alternative" theory is another example of the District Court's transplantation of the rationale of the "virtually unconditional" First Amendment to the Fourth Amendment. The requirement of the exploration of alternative methods for achieving a valid purpose is a direct outgrowth of the "overbreadth" principle applicable in First Amendment cases. That is, where the inquiry is whether or not a governmental policy abridges a "virtually unconditional" right, that policy must not only represent a "compelling" interest, but it must not infringe an area where the interest is not compelling. Accordingly, the means adopted to effectuate the policy must not overstep the bounds represented by the compelling interest. See e.g. *Sherbert* v. *Verner*, 374 U. S. 398, 403; *NAACP* v. *Button*, 371 U. S.

415, 438; *Shelton* v. *Tucker,* 364 U. S. 479, 488. However, "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose." *Shelton* v. *Tucker, supra* at 488 n. 8.

Even if an inquiry into such "less drastic means" had any relevance to the reasonableness of the home visit, the alternatives suggested do not, in fact, substitute for the home visit. Thus, the District Court considered that actual residence can be verified by a duly executed lease. But, as the dissent pointed out, leases are often nonexistent (see Exh. 1, 5/2/67 [Social Study]). Moreover, if the lease were to be the test of residence, appellee would not be eligible for assistance since, for her present apartment, her lease was executed by a person described by her to her caseworker as her brother but described to the landlady as her husband (Exh. 1, 5/7/68, 6/19/68, 8/2/68). The District Court next suggested that family composition could be determined by birth certificates. However, birth certificates, even if available, need have no relation to the number of persons actually resident on the premises. Appellee sought and obtained assistance for her niece, once her residence on the premises was verified (Exh. 1, 10/26/67). A birth certificate would have told nothing.

The Court further held that the welfare of the child can be adequately discerned by examination of school and medical records. In the first place, these are collateral sources and may not be examined without permission. Their examination is more an invasion of privacy than the direct home visit. Secondly, school records in the instant case are irrelevant. The only child of appellee is now about three years old. Moreover, such records provide an inadequate substitute for a home visit which examine areas not necessarily relevant in a report prepared by an unknown third person not directly concerned with the

problems involved. And, while medical examinations are an obvious and important feature of the welfare of any person, they may also provide merely *post-facto* and ambiguous evidence of a situation which might have been prevented and which might be prevented from recurring (see *supra*, pp. 22-23).

Finally, the opinion below decides that information about needed goods and services can be furnished by the recipient if desired (A. 128), supporting its position by referring to the recent move toward simplified eligibility. However, as we have shown (Point I, B, *supra*), that system has not eliminated all home visits. More important, it has not eliminated all required services for the child, "desired" or not.

None of the alternatives proposed is an equal substitute for the home visit. Each would be simply secondary evidence on which the agency may choose to rely although it is less positive than empirical verification. Nothing in the "simplified eligibility" program invalidates the existing requirement. The real question involved is one of the State's policy in allocating its resources and in assuring itself that its resources are properly allocated. *Dandridge* v. *Williams, supra* at 4279. An untried policy is now in operation on an experimental basis. Its future depends on federal executive and state legislative assessment of its strengths and weaknesses. That this experimental program is considered a step toward better promoting individual dignity and independence is not a subject of dispute here. But to say that the Constitution required this step, is clearly erroneous. *Katz* v. *United States*, 389 U. S. 347, 350-51.

POINT II

The requirement of a home visit does not place an impermissible burden on appellee's right of privacy or privilege against self-incrimination.

Because this case arose out of appellee's refusal to permit a home visit rather than as the result of anything learned during such a visit, she has argued that the termination of assistance, after a hearing for such refusal, places an unconstitutional burden on her right of privacy and penalizes her exercise of that right, relying on *Garrity* v. *New Jersey*, 385 U. S. 493 and *Spevack* v. *Klein*, 385 U. S. 511. The theory is untenable and the reliance is misplaced.

If the home visit is reasonable within the meaning of the Fourth Amendment then the termination of assistance is not a penalty for asserting a protected right. The "right" is not protected and the assertion of a "burden" does not overcome the basic defect in appellee's position.

Moreover, both *Garrity* and *Spevack* deal with the Fifth Amendment privilege against self-incrimination. That privilege applies to a more circumscribed area than the Fourth Amendment proscription against unreasonable searches and seizures, but in its sphere it is untouchable (Point IA, *supra*). Absent a co-extensive immunity against criminal prosecution, it may not be abridged by forcing, under threat of disbarment or job loss, disclosures which can be the basis of such a prosecution. *Gardner* v. *Broderick*, 392 U. S. 273.

However, if such immunity is established, information which the relevant government agency has a right to require must be forthcoming even if it would result in severing a relationship profitable to the one seeking to withhold information. No one has an absolute call on the public fisc. See *Gardner* v. *Broderick, supra; Piemonte* v. *United*

States, 367 U. S. 556, 559, n. 2; *Ullmann* v. *United States*, 350 U. S. 422, 431; *Brown* v. *Walker*, 161 U. S. 591, 600. If information is withheld, the agency may, after a hearing, terminate the association. *Gardner* v. *Broderick, supra; Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation*, —— F. 2d ——, Second Circuit, Docket No. 34338 (April 3, 1970) Sl. Sh. Op. page 2139. The "dilemma" posed is a real one if there is information which it is desired to withhold, but that dilemma cannot overcome the need of the government to protect its funds even where it cannot prosecute.

Thus, for reasons far different from those suggested by appellee, the instant case is directly analogous to the public contract cases. The opinion below concedes, as appellee has conceded, and as we have shown, that the applicant or recipient for AFDC assistance has an obligation to provide the information necessary to establish eligibility for assistance. Appellee, making her own decision as to what is relevant, offers to provide information outside of her home. However, as we have also shown, the home is directly relevant to the eligibility determination and appellee's offer, besides being of dubious value,* cannot foreclose examination of the home which has a testimonial value of its own.

The ability of government to inform itself of certain aspects of a person's life, related to the interest involved, has been upheld in a number of situations. For example, certain people must submit to blood tests. *Schmerber* v. *California*, 384 U. S. 757. Others must allow themselves to be fingerprinted. *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd. sub nom. Miller* v.

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* Appellee's lack of candor throughout her case history and her persistent refusal to cooperate and to provide relevant information, no matter where she was asked it, would make her offer appear to be unreliable (Exh, 1, 7/20/67, 8/14/67, 11/16/67, 5/7/68, 6/19/68).

New York Stock Exchange, —— F. 2d —— (2d Cir. 1970), *cert. denied* —— U. S. ——, 38 U.S.L. Week 3453 (May 18, 1970).

Appellee availed herself of the opportunity for a prior termination hearing at which she was represented by counsel. The hearing minutes are not a part of the record but it appears from the decision of the agency that appellee did no more than claim her right of privacy (A. 17). It does not even appear that she presented the very inadequate ground alleged in the complaint, the allegedly offensive nature of the questions she might be asked. It is abundantly clear that she did not invoke her privilege against self-incrimination.

Appellee's belated and half-hearted injection of her privilege against self-incrimination into this proceeding is devoid of any weight. The argument, not even hinted at in the complaint was most fully presented to the District Court in a post-argument memorandum solicited from appellee by that Court (A. 106-107).* It runs essentially that, because the home visit might disclose information for which she might be prosecuted, appellee may not be required to open her home to that possibility.

In the first place, appellee has never directly asserted that this is her claim. In the second place, the argument is wholly inconsistent with appellee's avowed willingness to provide any relevant information outside her home. Such information stands on no different footing, for self-incrimination purposes, from what is learned during a home visit. It could, under appellee's rationale, lead to prosecution no less easily. Accordingly, there is no reason to apply one standard to an interview in the home and another to an interview outside the home on this basis.

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* Appellant was neither notified of this request nor requested by the Court to brief the question. When appellant received appellee's memorandum (A. 108-114), permission was requested to reply (A. 115-118).

The remote possibility of criminal prosecution underlies any situation where benefit is sought to be secured by the furnishing of information. These run the gamut from tax deductions to farm price supports. This possibility does not mean that an entire administrative program must be placed within the confines of the standards to be observed in conducting criminal prosecutions. See *United States* v. *Walden*, 411 F. 2d 1109 (4th Cir. 1969). It is not the purpose of the home visit to obtain information for prosecutorial purposes. Contrast *Gardner* v. *Broderick*, *supra*; *Parrish* v. *Civil Sevice Commision*, *supra*. This is strongly evidenced by the fact that the home visit here was sought to be made on a week's notice and by the careful way in which home visits are circumscribed (*supra*, pp. 27-29).

One of the most acute problems in the administration of the New York City AFDC program—overpayment—(*Report of Findings of Special Review*, *supra*), may provide no basis for criminal prosecution and need not be dealt with on that level. However, the agency certainly must know if it is overpaying and must be able to correct the error. Should evidence nevertheless be obtained which might be made the basis of a criminal prosecution, it would be a simple matter at the time of such prosecution to test the issue by a motion to suppress. *Murphy* v. *Waterfront Commission*, 378 U. S. 1; *United States* v. *Blue*, 384 U. S. 251, 256. See *Lynumn* v. *Illinois*, 372 U. S. 528.

Similiarly, the existence of federal and state provisions requiring prosecution for welfare fraud (A. 108-114), does not alter the fact that such prosecution must be based on admissible evidence. Indeed, the home visit is not the chief, or even a significant means, of obtaining evidence of fraud (A. 115-116).

POINT III

The requirement imposed by the Court of a search warrant to make a refused home visit was an unauthorized supervision by the Court of the essential procedure determined by the State as requisite.

The District Court held that, once a home visit has been refused, the administrative agency may not terminate assistance but must, instead, obtain a "suitably restricted" (A. 129) search warrant and make the visit. This was an unwarranted assumption of supervision by the Court of the administration of welfare. See *King* v. *Smith*, 392 U. S. 309.

This anomalous result was attempted to be justified by reliance on the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530, holding that area inspections by such officials as fire and health inspectors must be made on warrants if entry is refused. Several crucial differences demonstrates the total inapplicability of *Camara to* this case.

First, the health or fire inspection is, by definition, a search for a violation punishable by law. Second, refusal to allow the inspection is punishable by criminal sanction. Third, the inspection is an examination of an objective condition such as faulty wiring which can be particularly described in a warrant. The home visit, by contrast, is not a search for incriminating evidence, and it is not enforceable by the criminal law. It is, moreover, not geared to a solitary factor which can be described in a warrant. It is a complex of tangible and intangible factors not designed to verify an isolable condition but directed to all of the factors bearing on the welfare of the children in the household and the fact that allocated funds are being directed, in the proper amount, to that welfare.

The complaint in this case graphically illustrates this inappropriateness of a search warrant to a home visit. Ap-

pellee's sole concern in the complaint is the questions she is asked during a visit. No warrant could solve this complaint and the District Court made no effort to deal with it.

There is a classic example of the home visit for interview purposes for which no warrant has been held to be required. That is the decennial visit of the census taker. Only this year has that visit been widely eliminated and then only for administrative, not constitutional reasons. Moreover, many of the questions asked by the census taker bear a remarkable congruence to the criteria of eligibility for assistance. *United States* v. *Rickenbacker,* 309 F. 2d 462 (2d Cir. 1962), *cert. denied* 371 U. S. 962.

A warrant is not necessary to inform a recipient of the purpose of the home visit. Nor is it necessary to limit the scope of that visit. The regulations covering the home visit do that. Indeed, appellee has successfully circumscribed the home visit on a number of occasions with no adverse results (5/2/67, 11/16/67, 5/7/68).

Thus, the principal reason for the warrant requirement in *Camara* is inapplicable here:

> "Under the present system, when the Inspector demands entry, the occupant has no way of knowing whether enforcement of the Municipal Code involved requires inspection of his premises, no way of knowing the lawful limits of the Inspector's power to search, and no way of knowing whether the Inspector himself is acting under proper authority." *Camara* v. *Municipal Court, supra* at 532.

See also *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263.

Thus, the purpose of the administrative warrant is not so much to establish probable cause, which is found in the valid governmental purpose involved, but to establish the nexus between the purpose of the visit and the person seeking entry to the home. Such a nexus already exists

between an applicant or recipient and the caseworker. It must be remembered that the home visit is not meant to turn the entrance of appellee's home into a revolving door. The fire inspector may no less be required to secure a warrant to enter her home than to enter any other person's. Appellee is required to permit entry to only one person, her caseworker, at specified intervals, prescribed by statute, under specified conditions. A warrant can do no more.

A warrant can do no more, that is, unless appellee's position at oral argument before the three-judge court is adopted. For there, appellee sought to have this case governed only by the criminal law, contending that appellee's home can be visited only if there is probable cause to believe she has committed a crime and then only on a warrant (A. 82). The opinion of the majority failed to enunciate clearly its reaction to this contention. In any event, the position of the appellee is wholly unjustified. Its effect, and, indeed, the effect of any warrant procedure, would only be inimical to the purposes of the AFDC program. As Judge McLean pointed out in dissent, "the warrant . . . [will] introduce a hostile relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust" (A. 136). The welfare worker would be transformed into a policeman and, thus, undercut the privacy and dignity of the individual. The administration of the program would be severely straitened. *Cf. Flemming* v. *Nestor,* 363 U. S. 603. The child would be effectively insulated from the agency. And it must be remembered that this case does not involve the unconscionable midnight raid or any other procedure designed to secure incriminating evidence. *Parrish* v. *Civil Service Commission, supra.*

While it does not appear to accept the criminal limitations on the home visit by warrants, the District Court

establishes absolutely no standards for such warrants. It does not indicate whether probable cause exists by virtue of the fact that it is time for the periodic review or whether the home visit must be refused before a warrant may issue. It does not state whether still more may be required such as a showing that, for example, the child is having trouble in school; that he is tardy or truant; that his grades are low or failing. The opinion does not indicate how a warrant could be "suitably restricted" to deal with these problems.

The District Court has created the anomalous situation of requiring search warrants to verify whether or not someone who has requested an allocation for which eligibility must be shown is entitled to the allocation. The State should not be required to go to the extent of employing such procedure to discover entitlement. While the State performs an assumed responsibility to assist an applicant or recipient to establish eligibility, it does not have an obligation to assist her in establishing such eligibility over her objection.*

Appellee's relationship with the Social Services Department may be analogous in some respects to a licensee in a closely regulated industry. Like the licensee, she has a specific relationship with an administrative agency and knows its nature and extent (Exh. 1, Intake Interview, Par. IV). She also knows her obligations under that relationship. Moreover, she knows the result of her failure to meet that obligation (A. 9).

Consequentiy closely apposite is the recent decision of this Court in *Colonnade Catering Corp.* v. *United States*, —— U. S. ——, 38 U.S.L. Week 4167 (February 25, 1970). In that case, an agent of a liquor licensee refused to open a locked portion of the licensed premises to Internal Revenue

* Thus, the holding of the District Court that its rule applies to applicants as well as recipients of AFDC assistance is particularly untenable.

Agents seeking proof that the licensee was selling untaxed liquor. The agents forced the door and seized certain bottles which formed the basis of a criminal prosecution. The Court of Appeals for the Second Circuit upheld the search because of the specificity of the statute in providing for inspections and the nature of the relationship between the licensee and the Internal Revenue Service (which is not the licensing authority).

While this Court reversed, its decision was based on the ground that the inspection statute did not authorize breaking in. It authorized only a fine for refusal to permit the requested inspection. The Court had no doubt that the statute could have provided for breaking in, even to obtain proof of criminal violation, in view of the nature of the regulatory interest 38 U.S.L. Week at 4169.

Unlike the officers in *Colonnade,* the agency in this case acted within the scope of its authority. Rather than force entry, it took the course provided of terminating assistance only after a hearing. Given the nature of the program at issue, this was the only appropriate response. In this respect, its action is not unlike that of a tax review board where, if proof is not forthcoming of a claimed deduction, the deduction is disallowed.

POINT IV

Particularly in view of the unique character of this case, it was not ripe for federal consideration in the absence of State review of the action of the New York City Department of Social Services.

Appellee has insisted throughout that the sole issue to be determined in this case is one of the rigid application of law to the pure issue of the right to make a home visit or to wreak the harsh result of terminating public assistance. Certainly, the law is clear that a home visit must

be made to determine initial eligibility for assistance (18 N.Y.C.R.R. § 351.10). With respect to continuing eligibility, the State requires a "contact" which may be a home or an office visit (18 N.Y.C.R.R. § 351.21). Some discretion, thus, rests in the administrative agency. This is not to say that the option rests with the client. It is to say that the agency has some latitude to take the client's preference into account if circumstances warrant it.

Despite the claim to represent a "class", appellee points to no other case in which action similar to the action in her case was taken. At the time her assistance was discontinued, appellee had been receiving aid for two years. She had never established her initial eligibility; she had never cooperated in attempts to learn whether the father of her child could contribute to his support (it is not even clear whether she is married); she had persistently requested items to which she was not entitled. Continuation of assistance under these circumstances became increasingly unjustifiable. Once appellee removed the possibility of verifying her continuing need by denying entry to her home, continuation of assistance could not be justified. New York maintains the most extensive AFDC program in the country.* Neither funds nor manpower is unlimited however. Appellee was accepted for assistance despite her questionable eligibility because of the imminence of the birth of her child (Exh. 1, 5/2/67 [Recommendation]). However, the need for such assistance, granted especially under such circumstances, cannot go perpetually unverified. The public interest demands that funds must not be allocated which need not be allocated.

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* The AFDC program in New York City alone involves 187,214 cases, totalling 722,830 persons receiving benefits amounting to $53,620,000 a year. 1968 figures. COMMITTEE ON WAYS AND MEANS, U. S. House of Representatives, *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), Tables A-13; A-15.

Appellee failed to call on the State in this case to balance her claims against the interest of the public at large. This failure should have barred or postponed federal litigation. Not only was a State forum available, but it should have been used. First, at the time this action was commenced, appellee had available to her a full range of constitutionally adequate administrative remedies. *Kelly* v. *Wyman*, 294 F. Supp. 887 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg* v. *Kelly*, —— U. S. —— 38 U.S.L. Week 4223 (March 23, 1970). The case is thus to be contrasted with *McNeese* v. *Board of Education*, 373 U. S. 668 and *Monroe* v. *Pape*, 365 U. S. 167 in which the Court expressed some doubt as to the availability of State relief. See *McNeese*, 373 U. S. at 674; *Monroe*, 365 U. S. at 183. See also *Dale Book Co.* v. *Leary*, 389 F. 2d 40, 42 (3rd Cir. 1968); *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967); *Potwora* v. *Dillon*, 386 F. 2d 74 (2d Cir. 1967). The adequacy of the available remedy in *Damico* v. *California*, 389 U. S. 416 does not appear in the opinion, although that case does pre-date *Goldberg* v. *Kelly*, *supra*.

Second, unlike the appellant in *Damico*, the appellee here began but did not complete the administrative process. She had a prior termination hearing but did not proceed to a state fair hearing. She should not be able to abandon her state remedies in mid-stream to seek a federal forum. Complete exhaustion of administrative remedies was particularly important here because of the vague nature of the complaint and the essentially administrative nature of the relief sought. Appellee was complaining about being asked unspecified questions. The twelve recipients supporting her position complained of the timing of visits and the circumstances under which interviews are conducted (A. 33-56). Such details are properly resolved by the administrative body involved.

Finally, a state forum, judicial or administrative, might have been able to alter substantially the nature of the questions involved (*Harrison* v. *NAACP*, 360 U. S. 167)

by its interpretation of Section 134-a of the New York Social Services Law which requires investigation of an application and personal contacts but does not mandate a home visit. This would apparently be a case of first impression for the State agency which could promulgate a flexible rule or adhere to a strict one. The question is one of policy for the State in the supervision of its AFDC program. *Rosado* v. *Wyman, supra* at 4273; *Dandridge* v. *Williams, supra; King* v. *Smith, supra.* At the least, they might require a showing of individual necessity for a home as opposed to an office visit before termination of aid if such a course were deemed wise. See *Reetz* v. *Bozanich,* —— U. S. ——, 38 U.S.L. Week 4170 (Feb. 25, 1970).

POINT V

The District Court acted prematurely and precipitously in granting plenary relief to appellee and the class she purports to represent without a full record. Accordingly, this case should, at the least, be remanded to the District Court with instructions to conduct a hearing of the issues.

The instant case had a short, full life in the District Court. The order to show cause was served, without prior notice, on the office of the attorney for the appellant on Friday, June 6, 1969, to be returnable at 10:00 A. M. on Tuesday, June 10, 1969 (A. 19). On that date, the attorney assigned to the case requested an adjournment and was given until June 13, 1969 to submit papers in opposition to the convening of a three-judge court and the issuance of a temporary restraining order. On June 13, the same day the papers were filed, Judge Tenney, in an opinion, ordered the convening of a three-judge court and issued a temporary restraining order with respect to the entire class of applicants and recipients of AFDC assistance (A. 27-31, 32-33).

The three-judge court was designated during the following week and attorneys for the appellee and appellant Wyman were informed by telephone that appellee's brief was due on June 23, 1969, the appellant's brief was due three days later, on June 26, 1969, and that oral argument would be heard on June 30, 1969. Appellant Goldberg's attorney was not informed by the Court of this schedule and found it impossible to meet when informed by counsel for appellant Wyman (A. 61).

Despite this fact, despite the fact that counsel for appellant Wyman protested this schedule orally to the Chambers of Judge Tenney, and despite the fact that a temporary restraining order was in effect, this unrealistic schedule was rigidly adhered to.

On the appointed dates, appellee submitted a brief and identical affidavits from twelve AFDC recipients (A. 33-56), appellant Goldberg submitted an answer (A. 57-58), and appellant Wyman submitted a motion to vacate or modify the temporary restraining order (A. 71), an answer and Exhibit (A. 62-66), an affidavit by a Deputy Commissioner of the New York State Department of Social Services (A. 67-70) and a memorandum of law directed to the question of whether or not a preliminary injunction should issue.

It was clear from the limitation of appellant's memorandum and from the offers at oral argument to obtain additional material (A. 86, 88), that the case was not in a posture for final decision. The District Court nevertheless granted both declaratory relief and a permanent injunction (A. 137-138). Declaratory relief was jurisdictionally unwarranted since, although answers were filed to the complaint, there was no finding, with respect to any disputed issues of fact and no motion for summary judgment.

This jurisdictional deficiency was compounded by the granting of a permanent injunction in utter disregard of the offers of additional evidence and the limited nature of appellant's memorandum.

At the very least, the District Court should have directed a trial of the issues. This is especially clear from the fact that it rested its opinion on the existence of viable alternatives to a home visit. These "alternatives" have no foundation in fact (*supra*, pp. 29-31). Of course, it is our basic position that we need not show the absence of other means for obtaining evidence of eligibility (*supra*, pp. 16-18, 29-30). However, if such a showing must be made, there must also be an opportunity to make it. This Court has emphasized that constitutional issues should not be decided except upon a full record. *Honeyman* v. *Hanan*, 300 U. S. 14, 25-26. Certainly, the District Court could not know if home visits could be dispensed with, since the results of the program experimenting with such a program are not yet known (and even that program does not dispense with all home visits). But appellant never had time even to explore the existence of evidence in support of home visits.

CONCLUSION

The decision below should be reversed and the complaint dismissed. In the alternative, the case should be remanded with instructions to hold a trial or to refer the appellee to her State remedies.

Dated: New York, New York, June 9, 1970.

Respectfully submitted,

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